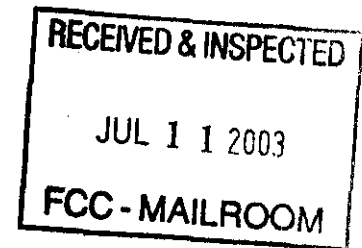


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Before the
Federal Communications Commission
Washington, DC 20554



In the Matter of)

Request for Immediate Relief filed by the)
State of Tennessee)Federal-State Joint Board on)
Universal Service)Changes to the Board of Directors of the)
National Exchange Carrier Association, Inc.)

CC Docket No. 96-45

CC Docket No. 97-21

ORDER**Adopted: July 2, 2003****Released: July 2, 2003**

By the Commission:

I. INTRODUCTION

1. The Federal Communications Commission has under consideration a Request for Immediate Relief filed by the State of Tennessee (Tennessee).¹ Tennessee seeks approval to change its service provider for Funding Year 2002 of the schools and libraries universal service support mechanism, before the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) has issued a Funding Commitment Decision Letter (FCDL) to Tennessee for Funding Year 2002. For the reasons set forth below, we grant Tennessee's Petition in part, and instruct USAC to process Tennessee's request in accordance with this Order.

¹ Request for Immediate Relief by the State of Tennessee to Change its Service Provider for Funding Year 2002 filed April 17, 2003 (Tennessee Petition).

II. BACKGROUND

A. Program Rules and Policies

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts on eligible telecommunications services, Internet access, and internal connections.² In the *Universal Service Order*, the Commission determined that competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed of the choices available to them and receive the lowest prices.³ Thus, the Commission's rules require eligible schools and libraries to seek competitive bids for all services eligible for discounts.⁴

3. In order to receive discounts on eligible services, the Commission's rules require that the applicant make a bona fide request for services by filing with the Administrator an FCC Form 470, which is posted to the Administrator's website for all potential competing service providers to review.⁵ After the FCC Form 470 is posted, the applicant must wait at least 28 days before entering into binding service agreements with its chosen providers.⁶

4. Once the applicant has complied with the Commission's competitive bidding requirements and signed a contract for eligible services, it must file an FCC Form 471 to notify the Administrator of the services that have been ordered, the carrier with whom the applicant has signed the contract, and an estimate of funds needed to cover the discounts to be given for eligible services.⁷ SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules.

5. Even after it approves a funding commitment, USAC does not provide funds directly to schools and libraries. Rather, the Administrator disburses funds to eligible service providers who, in turn, offer discounted services to eligible schools and libraries.⁸ There are two options

² 47 C.F.R. §§ 54.502, 54.503.

³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 480 (1997) (*Universal Service Order*) (subsequent history omitted).

⁴ 47 C.F.R. § 54.504.

⁵ Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (FCC Form 470); 47 C.F.R. § 54.504(b); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9078, para. 575 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert. denied, Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied, AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed, GTE Service Corp. v. FCC*, 121 S. Ct. 423 (Nov. 2, 2000).

⁶ 47 C.F.R. § 54.504(b).

⁷ 47 C.F.R. § 54.504(c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (FCC Form 471).

⁸ See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, *Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, FCC 99-291, paras. 8-9 (rel. October 8,

available to the applicant to receive discounts under the schools and libraries program.⁹ The applicant may ask its service provider to bill the discounted amount. Alternatively, the applicant may pay the full, undiscounted amount, and then file a Billed Entity Applicant Reimbursement (BEAR) Form to request reimbursement for the discount amount from the designated service provider.¹⁰

6. USAC has implemented a procedure to address specific situations in which a funding commitment has been approved, services have been rendered and paid for by the applicant at the undiscounted rate during a particular funding year, but the service provider is unable to receive BEAR payments. In situations where the service provider originally selected by an applicant has gone out of business or has filed for bankruptcy protection before processing BEAR payment(s) for the applicant, USAC permits the applicant to obtain BEAR payments through a substitute service provider, known as a "Good Samaritan".¹¹ The role of the Good Samaritan is simply to receive the BEAR payment from SLD and pass the reimbursement through to the applicant.¹²

7. Under Commission precedent, applicants also may request a change in service provider after receiving a funding commitment decision in certain circumstances. In particular, the Commission has concluded that it is appropriate to permit applicants to change service providers when (1) the change in service provider is permitted under state and local procurement rules; (2) the change is permitted under the terms of the contract between the applicant and the service provider; and (3) the applicant has notified the service provider of its intent to make such a change.¹³

8. As part of its ongoing activities to protect against waste, fraud, and abuse, USAC has, to date, deferred action on pending applications when it becomes aware of investigations by federal, state, or local authorities that potentially implicate compliance with program rules for that funding request. USAC does not notify applicants, however, that an application may be on hold, in order to avoid jeopardizing non-public investigations.

B. Tennessee's Funding Year 2002 Application

1999), *recon. pending; Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, FCC 00-350 (rel. October 26, 2000), *appeal pending sub nom., United States Telecommunications Association v. Federal Communications Commission*, No. 00-1500, filed November 27, 2000.

⁹ 47 C.F.R. 54.514(a).

¹⁰ See SLD's website, <<http://www.sl.universalservice.org/reference/8bear.asp>>.

¹¹ See SLD's website, <<http://www.sl.universalservice.org/reference/goodsam.asp>>.

¹² *Id.*

¹³ See *Request for Review of Decision of the Universal Service Administrator by Copan Public Schools, Copan, Oklahoma*, Order, File No. SLD-26231, CC Dockets No. 96-45, 97-21, FCC 00-100, 15 FCC Rcd 5498, 5501 (2000) (*Copan Order*).

9. On October 12, 2001, SLD posted Tennessee's Funding Year 2002 FCC Form 470, which sought bids for Internet access.¹⁴ On January 12, 2002, Tennessee filed its FCC Form 471, indicating that it had selected Education Networks of America, Inc. (ENA) as its service provider for Funding Year 2002.¹⁵ Tennessee notes that no appeals were filed, either with it or the FCC, relating to the selection of ENA as the winning bidder. ENA is an Internet service provider that provides Internet access throughout the state of Tennessee utilizing numerous telecommunications and network subcontractors.¹⁶ The statewide network provides Internet access to virtually all K-12 schools in the state of Tennessee.¹⁷ Pursuant to its contract with Tennessee, ENA and its subcontractors began providing Internet access to Tennessee's schools and libraries upon the commencement of the 2002-03 school year, even though SLD had not issued a funding commitment decision to Tennessee at that time.

10. In its FCC Form 471, Tennessee states that it is eligible for a 70 percent discount on eligible services, and thus, is responsible for payment of the 30 percent of the cost of the supported services.¹⁸ Under the terms of its contract with ENA, the total cost of Tennessee's Internet access for Funding Year 2002 is approximately \$1.8 million per month.¹⁹ Thus, according to Tennessee's FCC Form 471 discount calculation, Tennessee is responsible for 30 percent of the \$1.8 million monthly bill, approximately \$540,000 per month.

11. Late in 2002, it became public that the Federal Bureau of Investigation (FBI) and the Tennessee Bureau of Investigation (TBI) were investigating the former Governor of Tennessee and a number of individuals for alleged wrongdoing.²⁰ The details of the investigations have not been publicly disclosed, but appear to implicate a relationship between the former governor and

¹⁴ FCC Form 470, State of Tennessee Department of Education, filed October 12, 2001.

¹⁵ FCC Form 471, State of Tennessee Department of Education, filed January 12, 2002 (Tennessee's FCC Form 471). We note that Tennessee has selected ENA as its vendor for Internet access each year since the program's inception.

¹⁶ See State of Tennessee June 2, 2003 *ex parte* (June 2 *ex parte*). In addition to the telecommunications subcontractors, ENA also uses several software contractors to monitor traffic over the statewide network. Tennessee has identified the following entities as its key subcontractors: AT&T, BellSouth, Ben Lomand Rural Telephone Cooperative, Inc., Bledsoe Telephone Cooperative, Centurytel, Inc., Crockett Telephone Company, Inc., Dekalb Telephone Cooperative, Frontier Corporation, Highland Telephone Cooperative, MCI/WorldCom, Millington Telephone Company, North Central Telephone Cooperative, Peoples Telephone Company, Inc., Quest, Sprint, TDS Systems, and Twin Lakes Telephone Cooperative Corporation. June 2 *ex parte* at 3.

¹⁷ Tennessee Petition at 1.

¹⁸ See Tennessee's FCC Form 471. Tennessee has paid its non-discounted portion of the cost of services to ENA since it began receiving services. June 2 *ex parte* at 2.

¹⁹ See Tennessee's FCC Form 471, Attachment 21. Tennessee maintains that of this total, approximately 61% will be paid to the primary telecommunications and network subcontractors. June 2 *ex parte* at 2. Tennessee notes, however, that the actual percentage may vary depending on fluctuating levels of service for each carrier and vendor. June 2 *ex parte* at 3.

²⁰ Tennessee Petition at 1.

Albert Ganier, a principal of ENA.²¹ Upon receiving this information, USAC ceased processing Tennessee's application for Funding Year 2002. USAC has not issued a funding commitment decision to Tennessee and accordingly has not disbursed any universal service funds to ENA for Funding Year 2002.

C. Tennessee's Petition

12. Tennessee filed the instant petition with the Commission on April 17, 2003, seeking immediate relief to avoid discontinuance of the state's K-12 Internet service prior to the end of the current school year.²² Tennessee acknowledges that the delay in the issuance of a funding commitment is related to the ongoing investigation, but is concerned that the current investigation could continue for several years.²³ Tennessee, therefore, asks the Commission to allow it to substitute another service provider for ENA for Funding Year 2002. Specifically, Tennessee proposes that a substitute service provider be allowed to "step into the shoes of ENA" for the purpose of receiving and distributing universal service funds to subcontractors and others that are necessary to keep the State's network operating.²⁴

13. Tennessee proposes adapting USAC's Good Samaritan policy to the current situation.²⁵ Specifically, Tennessee proposes to designate a regulated common carrier as its substitute provider in place of ENA.²⁶ Tennessee asks that this common carrier be permitted to receive funds from USAC for services rendered and then distribute those funds to the subcontractors that have provided and continue to provide service to Tennessee throughout the funding year. Under Tennessee's proposal to substitute service providers, neither ENA nor its affiliates would receive any universal service funds.²⁷

²¹ Numerous media reports concerning the allegations are available on the Internet. *See e.g.* http://www.msnbc.com/local/knews/KNS_1781757.asp; www.newschannel5.com/news/investigates/friends/gov7.htm; http://oakridger.com/stories/031403/stt_0314030046.html; <http://www.polstate.com/archives/001905.html>.

²² Tennessee Petition. *See also* State of Tennessee June 4, 2003 *ex parte* (June 4 *ex parte*) (stating that several long distance providers and local and regional carriers providing approximately 75% of local connections for telecommunications services to support Internet services have plans to terminate connections, absent payments or reasonable assurances of payments from the FCC).

²³ Tennessee Petition at 2.

²⁴ Tennessee Petition at 3.

²⁵ Tennessee Petition at 3-5. Tennessee alternatively suggests that SLD allow it to make a pre-Funding Commitment Decision Letter Service Provider Identification Number (SPIN) change.

²⁶ Tennessee asserts that it has approached BellSouth Corporation, one of the major ENA subcontractors, about serving as the substitute service provider, and that BellSouth has agreed in principle to proceed in this fashion, subject to the preparation of appropriate agreements to implement the arrangement. Tennessee Petition at 2 n.2; June 2 *ex parte* at 2.

²⁷ Tennessee also proposes that BellSouth be permitted to request funds to pay the direct salaries of certain ENA employees who are necessary to keep the state's network operational until the end of Funding Year 2002. *See* June 2 *ex parte* at 3, 6.

14. In support of its petition, Tennessee asserts that it is cooperating fully with the pending investigations and will take appropriate action upon their conclusion.²⁸ It indicates that no evidence has been presented to it related to any state or ENA misconduct relating to the State's procurement process or its selection of ENA as the winning bidder for the service contract for Funding Year 2002.²⁹ Tennessee states that it has continued to pay ENA its portion (namely, the 30 percent of the total contract price) for services rendered over the course of the year. Tennessee indicates that it is open and flexible to any measures the Commission deems appropriate to allow the state to transfer universal service funding to a substitute carrier.³⁰

15. On April 21, 2003, the Wireline Competition Bureau (Bureau) released a Public Notice, seeking comment on Tennessee's Petition.³¹ Seven commenters, other than Tennessee, responded to the Public Notice.³² All commenters support Tennessee's request to substitute service providers for Funding Year 2002.³³

III. DISCUSSION

16. For the reasons set forth below, we conclude that it is appropriate to grant, in part, Tennessee's request by modifying the Good Samaritan policy in this limited instance. We direct USAC to process Tennessee's application and Good Samaritan election in accordance with the conditions set forth in this Order.

17. The Commission takes seriously all allegations of waste, fraud, and abuse. We are fully committed to maintaining the integrity of the schools and libraries support mechanism so that we adequately discharge our statutory obligation to preserve and advance universal service. At the same time, we recognize that inaction on a funding request during the pendency of a criminal investigation may have the effect of penalizing parties that are in no way implicated in

²⁸ Tennessee Petition at 2.

²⁹ Tennessee Petition at 2.

³⁰ Tennessee Petition at 2.

³¹ See *Wireline Competition Bureau Seeks Comment on a Petition by the State of Tennessee to Change its Service Provider for the Schools and Libraries Universal Service Support Mechanism Funding Year 2002*, CC Docket Nos. 96-45 and 97-21, Public Notice, DA 03-1186 (rel. April 21, 2003).

³² See Comments of Council of Chief State School Officers E-rate Alliance, Funds for Learning, Communications International Inc., Sprint Corporation, State of Tennessee Department of Education, State of Wisconsin Department of Public Instruction, Quest, and Reply Comments from Verizon Communications Inc.

³³ See, e.g., Qwest Comments at 3, 4 (stating, "it would work an unfair hardship on suppliers and subcontractors to ENA if they lost payment for goods and services already provided with the reasonable expectation of reimbursement," and "the Commission should not inject itself into an investigation being conducted by the state and a separate federal agency to create a bid winner by default"); Tennessee Secretary of Education Comments at 2 ("it is extremely important to the quality of education that Tennessee's schools continue to have access to the Internet"); Sprint Comments at 2 (because ENA has not been convicted of a crime, to ensure that there is no interruption in Internet access services and that service providers other than ENA are paid for the services rendered, Tennessee's request to replace ENA with a common carrier should be granted); Verizon Comments at 1 (the Tennessee request presents a unique set of circumstances, which the Commission can address without a larger policy change).

potential wrongdoing. Based on the circumstances presented, we conclude that it is justified in this instance to allow Tennessee to substitute service providers for purposes of passing through payments to subcontractors.

18. In reaching this decision, we find several factors persuasive. First, we are not aware of any allegations of waste, fraud, abuse, or other wrongdoing relating to any of the subcontractors that have provided service under the ENA contract, or, for that matter, the award of the specific ENA contract itself.³⁴ The relevant subcontractors have provided service in good faith to the schools of Tennessee, in reliance on the contractual agreement between ENA and Tennessee.³⁵ Second, in granting the requested relief to Tennessee, the risk of improperly paying a potential wrongdoer is diminished because, as discussed more fully below, no funds will be paid to ENA pending further developments in the ongoing investigation. Third, we find it significant that Tennessee was not in a position to take any action to protect its ability to receive universal service discounts in Funding Year 2002. The investigation involving ENA was made public five months after the commencement of the funding year, long after the filing window for Funding Year 2002 has closed, and long after Tennessee had entered into a contract with ENA for that funding year.³⁶

19. We conclude that, in light of the specific circumstances and the enumerated safeguards, it is appropriate to apply a modification of the Good Samaritan policy in this instance. We instruct USAC to grant Tennessee's request to substitute a common carrier as its Good Samaritan service provider for Funding Year 2002, consistent with its existing procedures for Good Samaritan providers and to process Tennessee's funding request. USAC shall determine whether the selected common carrier meets its existing criteria for identifying a substitute service provider.³⁷ If USAC determines that Tennessee's application for Funding Year 2002 otherwise complies with the rules of the schools and libraries program, USAC shall issue a funding commitment to Tennessee. Upon determining that all of the invoices submitted by ENA's subcontractors comply with program rules and procedures, USAC then may disburse funds to the designated common carrier for payment to ENA's subcontractors. USAC should determine the identities of the subcontractors, their portion of the contract, and the portion associated with services provided by ENA. USAC should ascertain what services have been rendered, the total cost of those services, and the amount that Tennessee has actually paid for the

³⁴ The Commission previously concluded that Tennessee had complied with our competitive bidding requirements when faced with a challenge to the original award of the contract to ENA in 1998. *See Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator*, 14 FCC Rcd 13734 (1999). We note that Tennessee previously had received funding commitments from USAC for Internet access provided by ENA in Funding Years 1998-2001.

³⁵ June 4 *ex parte* at 1, 2.

³⁶ Therefore, even if Tennessee had wanted to terminate its relationship with ENA and select another service provider, it could not have done so and still have timely filed its Funding Year 2002 application.

³⁷ USAC currently has procedures for the election of a Good Samaritan provider. *See* SLD's website, <<http://www.sl.universalservice.org/reference/goodsam.asp>>. In particular, USAC looks at whether the entity is a telecommunications provider, has a history of prompt BEAR reimbursements, is not delinquent on contributions to the universal service fund, and is certified for the appropriate funding year.

services rendered. USAC may disburse funds for services delivered until the end of Funding Year 2002.

20. We also instruct USAC to set aside on ENA's account any funds that would have been paid to ENA to compensate it directly for its services under the Tennessee contract, but we do not authorize any payment to ENA at this time.³⁸ We do not know how long the pending investigation may continue, and cannot predict its ultimate resolution. Absent an indictment or other public action, it may be difficult to determine whether the relevant authorities have concluded their investigation. We therefore cannot specify at this time the circumstances under which it would be appropriate for Tennessee or ENA to petition for reimbursement of funds owed to ENA for services rendered pursuant to ENA's Funding Year 2002 contract with Tennessee. At the same time, we expressly contemplate that ENA should have the opportunity to make its case at some future date that the remaining funds should be released to it for services rendered. If, however, ENA ultimately is found either civilly or criminally liable for any actions arising out of its participation in the schools and libraries program, the Commission shall initiate debarment proceedings pursuant to the rules adopted in the Commission's most recent order relating to the schools and libraries universal service mechanism.³⁹

21. We deny Tennessee's request that payments be made to its selected Good Samaritan provider to cover the salaries of certain key ENA employees who are necessary to keep the network operational for the remainder of the school year. We remain concerned about any funds going to persons currently employed by ENA at this point, especially given the percentage of funding that Tennessee asserts is required to pay these individuals.⁴⁰ We encourage Tennessee to explore alternative arrangements to ensure that its network continues to support the educational mission of the state.

22. In reaching this decision, we seek to balance USAC's proper caution in acting on a funding request that may be associated with a law enforcement investigation with the equally important objective of avoiding potentially harmful effects on third parties. We recognize that the circumstances surrounding other investigations may vary significantly. In granting this

³⁸ Tennessee represents that of the 70 percent to be paid out of the universal service fund, ENA ordinarily disburses approximately 61 percent to its primary telecommunications and network subcontractors. Approximately 39 percent of the universal service fund reimbursement would ordinarily go directly to ENA. Of this amount, roughly 18 percent represents payments to critical ENA employees that maintain the network, and 21 percent covers other expenses, costs, and overhead, such as depreciation, additional salaries, amortization, taxes, and insurance. See June 2 *ex parte* at 2.

³⁹ In such a circumstance, we would then address the disposition of any funds that USAC sets aside for ENA. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 03-101, para. 163 (rel. April 30, 2003) (changes to Part 54 of the Commission's rules shall be effective 30 days after publication in the Federal Register). We note that we also have sought comment on whether there are circumstances not culminating in civil judgment or criminal conviction that warrant debarment.

⁴⁰ See June 2 *ex parte* at 3, 7 (approximately 18 percent of the \$1.8 million monthly cost of Internet service would be paid to 37 "critical" employees of ENA).

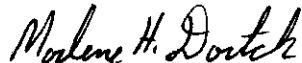
petition, we emphasize the narrowness of this fact-specific determination. We do not intend our action today to affect the efficient administration of this universal service support mechanism.

23. In conclusion, we emphasize that we seek to guard against waste, fraud and abuse, while ensuring that universal service is preserved and advanced. We recognize that the ongoing investigation may call into question compliance with Commission rules and requirements. If it is ultimately determined that Tennessee, ENA, or other party has violated any program requirements, the Commission shall take all appropriate actions to address that wrongdoing, including, if merited, seeking reimbursement of disbursed funds.⁴¹ It remains incumbent upon the applicant to ensure its compliance with all program rules. But we decline to relegate the Tennessee Funding Year 2002 application to limbo indefinitely, during the pendency of this ongoing investigation.

IV. ORDERING CLAUSE

24. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1-4, and 254 of the Communications Act of 1934, 47 U.S.C. §§ 151-154 and 254, and section 54.503 of the Commission's rules, 47 C.F.R. §54.503, that the Petition for Immediate Relief filed by the State of Tennessee on April 17, 2003, IS GRANTED to the extent provided herein. We instruct SLD to process Tennessee's Funding Year 2002 application and, if appropriate, disburse funds to the designated Good Samaritan provider, as provided herein.

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch WFC
Secretary

⁴¹ See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, FCC 99-291 (rel. October 8, 1999), *recon. pending*. See also *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 22975 (2000).

